

# SUPREME COURT OF WISCONSIN

\_\_\_\_\_  
No. \_\_\_\_\_  
\_\_\_\_\_

ROBIN VOS, IN HIS OFFICIAL CAPACITY AS WISCONSIN ASSEMBLY SPEAKER,  
ROGER ROTH, IN HIS OFFICIAL CAPACITY AS WISCONSIN SENATE  
PRESIDENT, JIM STEINEKE, IN HIS OFFICIAL CAPACITY AS WISCONSIN  
ASSEMBLY MAJORITY LEADER AND SCOTT FITZGERALD, IN HIS OFFICIAL  
CAPACITY AS WISCONSIN SENATE MAJORITY LEADER,

PETITIONERS,

v.

JOSH KAUL, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE  
STATE OF WISCONSIN,

RESPONDENT.

## PETITION FOR ORIGINAL ACTION

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## **ISSUES PRESENTED BY THE CONTROVERSY**

1. Whether Section 26 of Act 369 applies to “[a]ny civil action prosecuted by” the Attorney General, including when the Attorney General has engaged in some manner of pre-lawsuit negotiations.

2. Whether Sections 26 and 30 of Act 369 apply when the Attorney General “compromise[s]” the State’s litigation interests, regardless of whether the Attorney General obtains concessions from opposing parties in exchange for the compromise.

3. Whether Section 27 of Act 369 requires the Attorney General to deposit “all settlement funds into the general fund,” so that those funds are available for general revenue, and is not limited by Section 26 in any respect.

## INTRODUCTION

Just days after this Court issued its stay in *Service Employees International Union, Local I v. Vos*, Nos. 2019AP614-LV, 2019AP622 (hereinafter after “*SEIU*”), App. 50, putting Sections 26 and 30 of 2017 Act 369 (“Act 369”) back into effect statewide, the Attorney General informed the Legislature that he intended to render a significant portion of these very provisions a nullity. The Attorney General declared that he would not submit settlements to the Legislature, under Section 26, when those settlements involved some manner of pre-lawsuit negotiations. He also explained that he would not submit to the Legislature decisions not to file timely notices of appeal, under Sections 26 and 30, unless those decisions resulted from a settlement agreement. And he would refuse to deposit settlement money into the general fund under Section 27, for general expenditures for the people’s needs, because he viewed that provision as limited only to the small universe of cases that he interpreted Section 26 to apply to.

The Legislature, speaking through the same leaders that are defending Sections 26 and 30 in *SEIU*, files this Petition to ask

that this Court to bring the Attorney General into compliance with the law. Under Wisconsin law, the Legislature has a right to a seat at the table when the Attorney General seeks to settle away the State's litigation interests, including when he seeks to abandon his defense of statutes that the Legislature enacted, or when he seeks to compromise the public fisc. And under the Wisconsin Constitution and Wisconsin law, the Legislature has the right to appropriate public funds, without interference from other state officers, such as the Attorney General. The Attorney General's brazen effort to disrupt this statutory and constitutional separation of powers, through his unilateral, indefensible interpretations of Sections 26, 27, and 30 of Act 369 warrants this Court's assertion of its original jurisdiction authority.

### **STATEMENT OF FACTS**

1. Petitioner Robin Vos is the Speaker of the Wisconsin Assembly. His office is located at Room 217 West, State Capitol, Madison, WI 53703.

2. Petitioner Roger Roth is the Wisconsin Senate President. His office is located at Room 220 South, State Capitol, Madison, WI 53703.

3. Petitioner Jim Steineke is the Wisconsin Assembly Majority Leader. His office is located at Room 204 North, State Capitol, Madison, WI 53703.

4. Petitioner Scott Fitzgerald is the Wisconsin Senate Majority Leader. His office is located at Room 211 South, State Capitol, Madison, WI 53703.

5. Petitioners, collectively referred to here as Legislative Petitioners, speak for and bring this lawsuit on behalf of the Legislature, just as this Court properly concluded that they speak for the Legislature in *SEIU*. App. 57.

6. Respondent Josh Kaul is the Attorney General of Wisconsin. His office is located at 7 West Main Street, Madison, WI 53703.

7. In December 2018, the Legislature enacted law 2017 Wisconsin Act 369.

8. Section 26 of Act 369 renumbered Wis. Stat. § 165.08 to Wis. Stat. § 165.08(1) and amended it to provide that “[a]ny civil action prosecuted by the department . . . may be compromised or discontinued with the approval of an intervenor under s. 803.09 (2m) or, if there is no intervenor, by submission of a proposed plan to the joint committee on finance for the approval of the committee. The compromise or discontinuance may occur only if the joint committee approves the proposed plan.”

9. Section 30 of Act 369 renumbered Wis. Stat. § 165.25(6)(a) to Wis. Stat. §165.25(6)(a)1 and amended it to provide that “if the action is for injunctive relief or there is a proposed consent decree, the attorney general may not compromise or settle the action without the approval of an intervenor under s. 803.09 (2m) or, if there is no intervenor, without first submitting a proposed plan to the joint committee on finance.”

10. Section 27 of Act 369 amended Wis. Stat. § 165.10 to provide that “[t]he attorney general shall deposit all settlement funds into the general fund.”

11. In *SEIU*, the plaintiffs challenged numerous statutory provisions, including Sections 26 and 30 of Act 369.

12. On June 11, 2019, this Court stayed the temporary injunction previously issued by the Circuit Court in *SEIU*, as relevant here, with regard to Sections 26 and 30. App. 50.

13. In a letter dated June 17, 2019, the Attorney General wrote to Senator Alberta Darling and Representative John Nygren, the Chairs of the Committee (collectively, the “Chairs”), regarding his interpretation and ongoing implementation of Sections 26 and 30. App. 63.

14. The Attorney General informed the Chairs that he interpreted Section 26 to apply “only to the settlement or discontinuance of certain matters: civil court cases being prosecuted by DOJ.” *Id.*

15. The Attorney General further explained that under his view, Section 26 did not apply to “pre-suit resolutions of disputes, including agreements confirmed afterward by filing of a complaint

and a consent judgment . . . or cases where a final judgment has been entered by a court in a contested matter.” *Id.*

16. The Attorney General stated that, in his view, Section 30 “applies only to settlements involving injunctive relief or consent decrees.” *Id.*

17. The Attorney General further explained that “decisions to discontinue an appeal fall outside that section.” *Id.*

18. On June 21, 2019, the Chairs responded to the Attorney General’s June 17 letter, informing the Attorney General that it appeared that he intended to violate several provisions of Act 369, without regard to this Court’s decision to stay the temporary injunction in *SEIU*. App. 65.

19. With regard to Section 26, they explained that this statute clearly provides his office “cannot ‘compromise[] or discontinue[]’ ‘[a]ny civil action prosecuted’ by [his] office, without obtaining the statutorily-required consent.” *Id.*

20. The Chairs explained that the Attorney General had identified no legal basis for his conclusion that Section 26 did not

apply to cases that were filed in court following pre-suit negotiations and/or agreements and then discontinued or settled with a consent judgment. *Id.* at 65–66.

21. Similarly, the Attorney General had offered no legal basis for his contention that this statute did not apply to cases in which a final judgment has been entered but appellate review was available. *Id.* at 66.

22. The Chairs further informed the Attorney General that he appeared to intend to violate Section 30. *Id.*

23. They explained that the plain language of this statute applies to “*any* compromises or settlements” by the Attorney General in the relevant defense-side cases, including written settlement agreements, decisions not to seek appellate review of an injunction blocking the laws of Wisconsin, or the discontinuance of an appeal of such an injunction. *Id.* (emphasis in original).

24. The Chairs noted that the effect of the Attorney General’s compromise of an action by failing to appeal or discontinuing an appeal “would lead to a permanent injunction

blocking the laws of this State in the exact same way as a written statement,” contrary to the plain language of Section 30. *Id.*

25. Finally, the Chairs explained to the Attorney General that his office appeared to “be in violation of [Section 27],” which unambiguously requires that the Attorney General deposit “all settlement funds into the general fund.” *Id.* at 65.

26. The Chairs informed the Attorney General that, as of the date of the letter, it appeared that he had not deposited any settlement funds in the general fund. *Id.*

27. The Chairs requested that the Attorney General either inform the Chairs of the dates and times when his office had made the required deposits or remedy this violation by depositing “all settlement funds into the general fund” by June 28, 2019. *Id.*

28. The Attorney General responded to the Chairs’ June 21 letter on June 28, 2019. App. 70.

29. In addition to reasserting his position on Sections 26 and 30, the Attorney General asserted that his position on, and

ongoing implementation of, Section 27 is that this provision should be limited to cases where Section 26 applies. *Id.* at 73.

30. The Chairs responded to the Attorney General in a letter dated July 2, 2019, explaining why the Attorney General's interpretations of Sections 26, 30, and 27 was incorrect. App. 74.

31. The Chairs attached to their July 2 letter a memo, dated June 11, 2019, that the Legislative Fiscal Bureau received regarding funds received by the Attorney General from the beginning of 2019 through June 1, 2019 (the "Settlement Funds Memo"). App. 78.

32. The Settlement Funds Memo revealed that the Attorney General had received approximately \$20.19 million in funds during the first five months of 2019. *Id.*

33. On July 15, 2019, the Attorney General responded to the Chairs' July 2 letter. App. 82.

34. In addition to reiterating his views on Sections 26 and 30, he asserted that Section 27 allows settlement funds to be

“credited to the appropriation account under Wis. Stat. § 20.455(3)(g).” *Id.* at 84.

35. In his letters to the Chairs, the Attorney General made clear that he is currently acting, and will continue to act, on his interpretation of Sections 26, 27, 30.

36. The Attorney General is wrong, as a matter of law, in his ongoing interpretation and implementation of Section 26 because that provision applies to “[a]ny civil action prosecuted by” the Attorney General, including when the Attorney General has engaged in some manner of pre-lawsuit negotiations.

37. The Attorney General is wrong, as a matter of law, in his ongoing interpretation and implementation of Sections 26 and 30 because those provisions apply when the Attorney General “compromise[s]” the State’s litigation interests, including by failing to file a timely appeal or dismissing an appeal, regardless of whether the Attorney General obtains concessions from opposing parties in exchange for the compromise.

38. The Attorney General is wrong, as a matter of law, in his ongoing interpretation and implementation of Section 27 because that provision requires the Attorney General to deposit “all settlement funds into the general fund,” so that those funds are available for general revenue, and is not limited by Section 26 in any respect.

39. The Attorney General is currently acting under his interpretation of Section 26, and intends to continue to act under that interpretation, unless such action is determined to be unlawful by this Court.

40. The Attorney General is currently acting under his interpretation of Section 30, and intends to continue to act under that interpretation, unless such action is determined to be unlawful by this Court.

41. The Attorney General is currently acting under his interpretation of Section 27, and intends to continue to act under that interpretation, unless such action is determined to be unlawful by this Court.

42. The Attorney General's actions and intended actions under his interpretation of Section 26 are causing ongoing harm to the Legislature because, when the Attorney General takes unilateral litigation actions that should have been submitted to the Legislature for approval under Section 26, he is depriving the Legislature of its statutory right to review those actions. *See Panzer v. Doyle*, 2004 WI 52, ¶ 42, 271 Wis. 2d 295, 680 N.W.2d 666, *abrogated on other grounds by Dairyland Greyhound Park, Inc. v. Doyle*, 2006 WI 107, 295 Wis. 2d 1, 719 N.W.2d 408.

43. The Attorney General's actions and intended actions under his interpretation of Section 30 are causing ongoing harm to the Legislature because, when the Attorney General takes unilateral litigation actions that should have been submitted to the Legislature for approval under Section 30, he is depriving the Legislature of its statutory right to review those actions. *See Panzer*, 2004 WI 52, ¶ 42. In addition, when the Attorney General compromises away state law, this imposes harm of the "first magnitude" on the "Legislature." App. 57.

44. The Attorney General's actions and intended actions under his interpretation of Section 27 are causing ongoing harm to the Legislature because, under the Wisconsin Constitution, the Legislature has the right to appropriate general funds. Wis. Const. art. VIII, § 2; *see Panzer*, 2004 WI 52, ¶ 42. By withholding settlement fund dollars from the general fund, the Attorney General is preventing the Legislature from appropriating that money, as it decides is in the public interest, as is its statutory and constitutional right and obligation.

45. The Legislature is the most appropriate party to bring this action, through Legislative Petitioners, because no other party has an "equivalent stake" in this dispute between the Legislature and the Attorney General. *Panzer*, 2004 WI 52, ¶ 42.

#### **STATEMENT OF RELIEF SOUGHT**

If this Court grants the Petition, Legislative Petitioners will ask this Court to issue a declaratory judgment, *see, e.g.*, Wis. Stat. § 806.04, that makes clear that the Attorney General's interpretations of Sections 26, 27, and 30 of Act 369 are wrong as a matter of law. If determined necessary, Legislative Petitioners

may also request that this Court provide other appropriate equitable relief, *see, e.g.*, Wis. Stat. § 806.04, to require the Attorney General to comply with Sections 26, 27, and 30 of Act 369.

**STATEMENT OF THE REASONS WHY THIS COURT  
SHOULD TAKE JURISDICTION**

As discussed in more detail in the Memorandum In Support of Petition for Original Action, this Court should grant this Petition. This case involves an effort by the Attorney General to effectively nullify a significant portion of the operation of Sections 26, 27, and 30 of Act 369 and thereby seize power for himself that belongs to the Legislature under statutes and the Wisconsin Constitution. Prompt resolution of this legal dispute is of the essence to the public interest because, absent this Court's action, the Attorney General has made clear that he will continue to settle cases without giving the Legislature a seat at the table and will continue to retain funds for his office's use, when that money rightfully belongs to the people. And this case presents only purely legal issues of statutory interpretation, meaning that no factfinding by this Court would be needed.

## CONCLUSION

This Court should grant the Petition and reject the Attorney General's interpretation of Sections 26, 27, and 30 of Act 369.

Dated this 1st day of August, 2019.

By:  

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